

STEVE J. BANKS)	
Claimant)	
VS.)	
)	Docket No. 1,050,206
TERRY GWIN, d/b/a GWIN TILE COMPANY)	
Respondent)	
AND)	
)	
AMERICAN FAMILY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

Respondent appeals the January 20, 2011, Award of Special Administrative Law Judge Jerry Shelor (SALJ). Claimant was awarded a 10 percent whole body functional disability after the SALJ determined that the opinion of claimant's medical expert, board certified emergency and occupational medicine expert P. Brent Koprivica, M.D., was more credible than that of claimant's treating physician, board certified orthopedic surgeon David K. Ebelke, M.D.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the SALJ. The Board heard oral argument on May 4, 2011.

1. What is the nature and extent of claimant's injury herein? Respondent contends that claimant's impairment is zero percent or, in the alternative, 5 percent pursuant to the medical opinion of claimant's treating physician, Dr. Ebelke. Claimant contends that the medical opinion of Dr. Koprivica is more in line with the

requirements of the fourth edition of the *AMA Guides*¹, and the Award of the SALJ should be affirmed.

2. Did the SALJ exceed his authority and/or jurisdiction in granting benefits? Respondent raises this issue in its Request For Board Review, filed on January 20, 2011. However, after reviewing respondent's brief and listening to the oral argument in this matter, it is clear that respondent's objection centers around the award of a 10 percent whole person impairment, which is a nature and extent question.

FINDINGS OF FACT

Claimant had been employed by respondent for 16 years as a tile craftsman. This work required that claimant regularly lift items weighing up to 60 pounds. Claimant also did rough-in work, plumbing and tile setting. On April 27, 2009, claimant was lifting a box of porcelain tile which weighed about 60 pounds when he felt a snap in his back. Within a few hours, claimant's back pain extended into his left leg to the knee, and later into his left foot. Claimant reported the injury and was referred for medical treatment at Corporate Care. Claimant returned to work on light duty about a week after the initial accident. At first claimant was able to work, but within a few days he began experiencing additional problems.

Claimant was referred to and examined by orthopedic surgeon Adrian P. Jackson, M.D. Dr. Jackson ordered an MRI study, which he read as showing no specific herniation or severe stenosis. Claimant was referred for six to eight weeks of physical therapy. Dr. Jackson advised claimant to quit smoking and get out of his current line of work. Dr. Jackson last examined claimant on August 24, 2009. Claimant was found to be at maximum medical improvement (MMI) on August 24, 2009. Although he recommended that claimant change his work, Dr. Jackson did not impose any specific restrictions on claimant that would limit claimant's ability to continue laying tile.

After being released from Dr. Jackson's care, claimant requested a second opinion regarding his back pain. He was then referred to Dr. Ebelke on September 28, 2009. Claimant had complaints of left low back pain, extending into the left hip/buttock and thigh and to the knee. Dr. Ebelke determined the symptoms were suggestive of an L4 dermatome pattern. However, an MRI done earlier showed no clear explanation for the leg symptoms. Epidural injections had not been tried. Dr. Ebelke reviewed the lumbar MRI finding a loss of disc signal intensity at L4-5 with mild loss of disc height. There was a slight bulge on the left side. Additionally, the left L3-4 foramen looked a little odd on one of the sagittal images, suggesting a possible proximally migrated herniation. Additionally, the slice #9 on both sets of axials was suspicious for a very small proximally migrated

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

left-sided herniation at L4-5, which was close to the L4 root, although the doctor found that it was not directly compressing it.

Dr. Ebelke noted that neither Dr. Jackson nor the radiologist commented on the slight abnormality on the MRI. He agreed that the abnormality was subtle, but stated in his report, that "if real it would correlate with his symptoms".² Epidural injections were suggested as an initial treatment. EMG studies were also recommended.

Dr. Ebelke reviewed the EMG, which was negative except for "irritability" but no nerve root compression. An epidural was then administered on December 1, 2009. Claimant later reported that the epidural provided no benefit. In fact, claimant reported an increase in pain for a few days. Dr. Ebelke testified that claimant's lack of response to the epidural injections indicated that claimant did not have significant nerve root compression.

As of December 18, 2009, claimant was found to be at MMI and was released by Dr. Ebelke with no permanent restrictions. Dr. Ebelke noted that surgery was only an option if claimant's pain was severe enough. Claimant elected to forgo the surgery. As of the December report, claimant remained off work after bilateral carpal tunnel surgery in October/November 2009.

In a January 21, 2010, letter to respondent's insurance company, Dr. Ebelke found that claimant had no permanent impairment from this injury. Claimant did have some age-related changes in his spine which could be rated under the AMA *Guides* in DRE Category II for a 5 percent whole person impairment. But this rating would not be related to claimant's work injury. Claimant clearly did not meet the criteria for a DRE Category III. More evidence than subjective complaints would be necessary. He agreed that Dr. Jackson reported minimal radiculopathy in his August 24, 2009, report. However, Dr. Ebelke cautioned that the term was being used as a symptom only.

On cross-examination, Dr. Ebelke agreed that claimant was having constant pain daily. Additionally, the MRI displayed neural foraminal narrowing, greater on the left side, with a small central posterior annular tear at L5-S1. There was also mild loss of disk height at L4-5 noted. Dr. Ebelke found claimant to be legitimate in his complaints. Dr. Ebelke noted that the epidural steroid injections were recommended in an attempt to improve claimant's left leg symptoms and to see if the symptoms were radicular in origin. As the epidural injections provided no benefit to claimant, it indicated that the pain in claimant's leg was not radicular in origin, which is what the EMG also suggested. Dr. Ebelke determined that there was no evidence of a permanent injury here and assigned no permanent restrictions or impairment rating. Dr. Ebelke did determine that claimant had a 5 percent whole person functional impairment pursuant to the fourth edition of the

² Ebelke Depo., Ex. 2 (Ebelke's Sept. 28, 2009, report at 2).

AMA *Guides*³ for age-related changes in his low back. Claimant indicated that he was not limited by preexisting low back pain. But, since the accident, claimant's back pain was constant.

Claimant was referred to Dr. Koprivica by claimant's attorney on May 26, 2010. Claimant complained of ongoing left leg pain with pain in the left buttock, radiating into the thigh to the left knee level. Claimant was also beginning to develop right-sided leg complaints. Claimant told the doctor that his sitting tolerance was less than 45 minutes and his standing tolerance was less than 20 minutes. Claimant displayed loss in range of motion in lumbar flexion and extension. Dr. Koprivica did not believe that claimant had an ongoing active radiculopathy during the examination. He also acknowledged that there was no electrodiagnostic evidence of radiculopathy. There was a 2 centimeter loss on the left thigh and calf as compared to the right. Dr. Koprivica also noted a left L3-4 disk herniation with L3 radiculopathy associated with that disk herniation.

Dr. Koprivica stated several times during his deposition and in his May 26, 2010, report that claimant had a documented disk herniation. Based in part on that finding, Dr. Koprivica found claimant to fall in DRE Category III of the fourth edition of the AMA *Guides*⁴. The three findings which allowed claimant to be within DRE Category III were the documented disk herniation, findings of atrophy and the epidural steroid injections. Claimant was accordingly rated at 10 percent to the whole person. Claimant was restricted to medium physical demand level activity. Dr. Koprivica acknowledged that he did not have the actual MRI film and was relying on the report. He also agreed that DRE Lumbosacral Category III required significant signs of radiculopathy and atrophy greater than 2 centimeters above or below the knee. Claimant's atrophy was 2 centimeters above and below the knee.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁵

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁶

³ AMA *Guides* (4th ed.).

⁴ AMA *Guides* (4th ed.).

⁵ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

⁶ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁷

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁸

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁹

The accident in this matter is not disputed. The evidence also supports a finding that claimant had no preexisting low back complaints or impairment leading up to this accident. Dr. Ebelke attempts to differentiate between claimant's age-related conditions and the accident on April 27, 2009. The law in Kansas does not allow so fine a distinction. Here, the accident caused what appears to be a preexisting condition to become symptomatic. That causes the condition to be compensable under current Kansas law. Before the work injury, claimant was asymptomatic and had no rateable impairment under the AMA *Guides*. Post injury, claimant has a rateable impairment of function. The question herein is to what extent has claimant been impaired as the result of this accident, including any aggravation or acceleration of that preexisting condition. On that point, Dr. Ebelke and Dr. Koprivica differ. Both cite the fourth edition of the AMA *Guides*¹⁰ in support of their opinions. A reading of the AMA *Guides* finds both support and contravention to the doctors' opinions.

DRE Lumbosacral Category II provides a 5 percent whole person impairment when dealing with "no objective sign of radiculopathy and no loss of structural integrity."¹¹ However, Dr. Ebelke noted potential objective signs of radiculopathy and loss of structural integrity with the MRI and EMG results.

⁷ K.S.A. 2008 Supp. 44-501(a).

⁸ K.S.A. 44-510e(a).

⁹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

¹⁰ AMA *Guides* (4th ed.).

¹¹ Ebelke Depo., Ex. 3.

DRE Lumbosacral Category III provides for a 10 percent whole person impairment. But, the AMA *Guides* require “significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of greater than 2 cm above or below the knee. . . The impairment may be verified by electrodiagnostic findings.”¹² Dr. Koprivica could not verify significant signs of radiculopathy as claimant’s reflexes were measured as normal and the atrophy was not greater than 2 centimeters either above or below the knee. Additionally, the electrodiagnostic tests did not verify or support the diagnosis of radiculopathy.

From this record, it would appear that the truth lies somewhere in between the medical opinions of the doctors. The Board finds that claimant has suffered a 7.5 percent whole person functional impairment as the result of the accident on April 27, 2009, while working for respondent. The Award of the SALJ is modified accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be modified to award claimant a 7.5 percent whole person functional impairment for the injuries suffered to his low back on April 27, 2009. In all other regards, the Award of the SALJ is affirmed in so long as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Jerry Shelor dated January 20, 2011, should be, and is hereby, modified to award claimant a 7.5 percent whole person functional impairment, but affirmed in all other regards in so long as it does not contradict the findings and conclusions contained herein.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Steve J. Banks, and against the respondent, Terry Gwin, d/b/a Gwin Tile Company, and its insurance carrier, American Family Mutual Insurance Company, for an accidental injury which occurred on April 27, 2009, and based upon an average weekly wage which results in a maximum weekly benefit of \$529.00.

Claimant is entitled to 31.13 weeks of permanent partial disability at the rate of \$529.00 per week or \$16,467.77, for a 7.5 percent permanent partial functional whole body disability, making a total award of \$16,467.77.

¹² Koprivica Depo., Ex. 4.

As of the date of this Award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.¹³

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Marcia L. Yates Roberts, Administrative Law Judge

¹³ K.S.A. 44-536(b).